case,) then we must find in the common law, the rules by which they are to be established. The fundamental rules of evidence are, that the best shall always be produced, and that every fact shall be proved by the oaths of witnesses, unless the law has prescribed some other mode. The plaintiff had to show: 1st. That a justice had jurisdiction of his case by the law of North Carolina; 2d. That the person who decided it, was a justice; and 3d. That he did in fact render the judgment alleged."

"The certificates of the clerk and presiding magistrate of the county were not under oath; nor are they by any enactment made authentic in proceedings of this character. The law of North Carolina, by which the justices had jurisdiction of this case, might have been proved under the provisions of the act of 1790, or according to our precedents, by the production of the printed laws of that State. In the same manner it might be shown that the person who signed the judgment was a justice, if his appointment had been made by the Legislature. If the appointment was by the governor, or by any other authority, then an exemplification of the office books, certified according to the act of Congress of 1804, would have proved it." M.

RECENT AMERICAN DECISIONS.

In the Supreme Court of Iowa, June, 1856.

M'MANUS *vs.* CARMICHAEL.[1]

1. Although the ebb and flow of the tide was, at common law, the most usual test of navigability, it was not necessarily the only one.
2. But however this may be, that test is not applicable to the Mississipi river.
3. The common law consequences of navigability, attach to the legal navigability of the Mississipi.

[1] From 2 Clarke's Cases in Law and Equity, determined in the Supreme Court of the State of Iowa. We are indebted to the learned State Reporter for this case; and regret that its very great length compels us to present only the head note and some of the more important parts of the opinion. The whole case is an elaborate discussion of an important branch of law, and the arguments of counsel and opinion of the court equally merit careful study.—*Eds. Am. L. Reg.*

4. The term *navigable*, embraces within itself, not merely the idea that the waters could be navigated, but also the idea of publicity, so that saying waters are public, is equivalent, in legal sense, to saying that they are navigable.

5. Yet the navigability, in fact, is the leading idea, and is the ground of their publicity.

6. The ebb and flow of the tide does not, in reality, make the waters navigable, nor has it, in the essence of the thing, anything to do with it.

7. It is navigability *in fact*, which forms the foundation for navigability *in law*, and from the *fact*, follows the appropriation to public use, and hence its publicity and legal navigability.

8. The real test of navigability, in this country, is ascertained by *use*, or by public act or declaration.

9. The acts and declarations of the United States declare and constitute the Mississipi river a public highway, in the highest and broadest intendment possible.

10. The rule that a grant is to be construed most strongly against the grantor, does not apply to public grants.

11. The government being but a trustee for the public, its grants are to be construed strictly.

12. Grants of land by the United States, by patent, have relation to the survey, plats, and field notes.

13. The common law knows but two lines—the *medium filum aquæ* and high water. If the stream be navigable, the boundary of the adjoining land is the one; if not navigable, the boundary is the other.

14. By the common law, the riparian proprietor on navigable waters, owns to high-water mark only, and this rule applies to the Mississipi river.

Appeal from the Scott District Court.

This was an action of trespass, for taking two loads of sand from the soil of the plaintiff, McManus. The *locus in quo* is in Scott county, and in the Mississipi river. The river, at this part of it, and for nearly thirty miles, runs nearly from east to west. In the middle of the river is Credit island, containing about two hundred and sixty acres. Between Credit island and the main land, on the north, or Iowa side, is a very small island, called Crane island, containing about seven acres. Off the east end of Credit island (it being up stream), is Pelican island, containing about eleven acres.

In 1837 or 1838, the United States surveyed, and in 1840 sold,

the public lands in Scott county. They surveyed the main land and Credit island, but did not survey the other two small islands, which overflowed; and which are now called Crane and Pelican. The main land on the Iowa or north side, opposite Pelican island, and the *locus in quo*, was sold to E. Cook, and Credit island to A. H. Davenport. At a subsequent date, Crane and Pelican islands were surveyed, and the latter sold to the plaintiff by patent, dated April 10th, 1849, in which the description is as follows: "Lot number three and Pelican island, of section three, in township seventy-seven, north of range three, east of the fifth principal meridian, * * * according to the official plat of the survey of the said lands returned to the general land office of the Surveyor-General," &c. At the east or upper end of Pelican island, is a *sand-bar*, which is exposed at low water, and which is the *locus in quo*. From this sand-bar between high and low-water mark, the defendant took two boat-loads of sand, taking it from the outside of the meanders of the survey by the United States. The whole island is subject to overflow at unusually high water.

The plaintiff has no other possession than a constructive one, arising from title, if he has this; and the object of this suit is to try his title to the sand-bar, outside of the lines of the survey, between high and low water, up stream. The court found for the plaintiff, and judgment was rendered in his favor, from which the defendant appeals.

Whitaker and *Grant*, for the appellant.
Cook and *Dillon*, for the appellee.

The opinion of the court was delivered by

WOODWARD, J.—This is the first case which has arisen in the Territory, or State, of Iowa, raising the question of riparian rights on the Mississippi river; and the question whether that river is a navigable stream, in the broad sense, or only in a limited one; and whether its shores or bed, or both, belong to individuals, or to the public? The cause might be disposed of briefly, but it calls for a somewhat free and full examination, on account of its interest and importance; on account of the fullness with which it has been pre-

sented by counsel, arraying the authorities from all the States upon all sides of the questions involved; and on account of the state of the authorities; in which much has been erroneously taken for granted—a bearing given to previously decided cases, which they would not warrant—and unsupported inferences drawn from fair decisions.

We are of the opinion that the plaintiff cannot maintain his action. And in expressing our views, we will consider the following three propositions: First. Although the ebb and flow of the tide was, at common law, the most usual test of navigability, yet it was not necessarily the only one. Second. However the truth may be upon the above proposition, that test is not applicable to the Mississippi river. Third. The common law consequences of navigability, attach to the legal navigability of the Mississippi.

First. Although the ebb and flow of the tide was, at common law, the most usual test of navigability, yet it was not necessarily the only one. The term navigable embraces within itself, not merely the idea that the waters could be navigated in fact, but also the idea of publicity, so that saying waters were public, was equivalent, in legal sense, to saying they were navigable. Yet the navigability in fact, was the leading idea, and was the ground of their publicity. But on the other hand, there are in England and in this country, many arms of the sea, which, though not navigable in fact, are so legally. It is worthy of attention, that the ebb and flow of the tide does not, in reality, make the waters navigable, nor has it, in the essence of the thing, anything to do with it. The fact that certain rivers were accessible, and could be navigated by vessels of considerable burthen, always constituted the substance of the thing. But, as in England, the tide waters, particularly the seas, were by far the most important; and as all of the rivers of that country, navigable in fact, were affected to a greater or less extent, by the tide; and as the high and important admiralty jurisdiction was always governed by this criterion, the ebb and flow of the tide became the usual test. The nature of the admiralty, relating as it did, to the high seas, where the king's authority had sole sway, and to the arms of the sea, gave prominence to the tidal ebb and flow, in

legal thought. But there is nothing in nature, or reason, to constitute this the only criterion. *Blanchard* vs. *Porter*, 11 Ohio 143; 12 How. 454.

In the treatise on the law of waters, by Woolrych, 40 (margin), he divides rivers into public and private. He says: "A public navigable river frequently owes its title to be considered as such, from time immemorial; by reason of its having been an ancient stream; but very many acts of Parliament have been passed, to constitute those navigable rivers, which were not so before. Waters flowing inland, where the public have been used to exercise a free right of passage, from time whereof the memory of man is not to the contrary, or by virtue of legislative enactments, are public navigable rivers. This is the most unfailing test to apply, in order to ascertain a common right; others have been attempted, and frequently without success." Thus he negatives the idea that none are navigable but where the tide flows. And then he proceeds to show, that all waters are not navigable (in the legal sense) where the tide does flow; and he cites the case of *The Mayor of Lynn* vs. *Turner*, Cowp. 86, in which it was contended, that a river which flows and reflows, and is an arm of the sea, is, *prima facie*, common to all; and therefore "it was urged that an action on the case could not be sustained against the corporation of Lynn, for the non-repair of a certain creek, because the tide of the sea had been accustomed to flow and reflow therein; consequently, it was said, this non-feasance was punishable by indictment only, because the water must be deemed public. But this argument was treated by the court as a fallacy; for they denied that the flowing or reflowing of the tide constituted a navigable stream; there being many places where the tide flows, which are not navigable; and the place in question might be a creek in the private estate of the corporation." The language of Lord Mansfield, in that case, is emphatic: "How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so."

In *Miles* vs. *Rose*, 5 Taunt. 706, Gibbs, C. J., says that the flowing of the tide, though not absolutely inconsistent with a right of private property in a creek, is strong *prima facie* evidence of its

being a public navigable river; and Heath, J., expresses the same opinion. And in *Rex* vs. *Montague*, 4 B. & C, 598, in 1825, Bayley, J., says: "The strength of this *prima facie* evidence must depend upon the situation and nature of the channel. If it is a broad and deep channel, calculated for the purposes of commerce, it would be natural to conclude that it has been a public navigation; but if it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time, and by very small boats, it is difficult to suppose that it ever has been a public navigable channel." And Holroyd and Littledale, Justices, concur: 10 E. C. L. 414. And Woolrych, again, makes the following conclusion: "The circumstance, therefore, of the flow and reflow of the tide, is one of the strongest in support of a public right; but so far from being conclusive, we have mentioned a case in which such a test has been found to be fallible. Public user, for the purposes of commerce, is, consequently, the most convincing evidence of the existence of a navigable river," &c. It seems clear, then, that even taking the doctrine of the English books, whilst the flow of the tide became, and was spoken of as the usual test, yet it was not this which constituted a stream navigable, nor was it the only test; and that sometimes even this failed. See Hale's *De Jure Maris*, in 6 Cow. 539.

* * * * *

Second. However the truth may be upon the first proposition, the flow and reflow of the tide is not applicable to the Mississippi, as a test of its navigability. And third: The common law consequences of navigability, attach to the legal navigability of the Mississippi river. The arguments and authorities upon these two propositions, being in a great measure identical, they must be considered together.

The thought has been before suggested, that as a real and virtual test, the tide is a merely arbitrary one, and is not supported by reason; since many waters where the tide flows are not in fact navigable, and many where it does not flow, are so. It is navigability in fact, which forms the foundation for navigability in law; and from the fact follows the appropriation to public use, and hence

its publicity and legal navigability. It is true, that this legality attaches to some waters which do not possess the requisite quality in fact, but this arises from their relation to the high seas, and to admiralty, and from the difficulty of making an hundred exceptions. It is impossible to bring the mind to an approval, when we attempt to apply to the rivers of this country, stretching up to three thousand miles of extent—flowing through or between numerous independent States—and bearing a commerce which competes with that of the oceans—a test which might be applicable to an island not so large as some two of our States; and to streams whose utmost length was less than three hundred miles, and whose outlet and fountain, at the same time, could be within the same State jurisdiction. In England, or in Great Britain, the chief rivers are the Severn, Thames, Kent, Humber, and Mersey; the latter of which is about fifty, and the first about three hundred miles in length, and of this (the Severn) about one hundred miles consists of the British channel. The world-renowned Thames, has the diminutive proportions of two hundred miles. And of even these lengths, not the whole is navigable. Thus, it will be seen, that these chief rivers of good old England, range in extent with our Connecticut, Merrimac, Hudson, Allegany, Monongahela, Cedar, Iowa, and Des-Moines, and bear a proportion of one to twenty, when compared with the greater rivers of this continent.

* * * * *

The courts in the States of Maine, New Hampshire, Connecticut, New York, Maryland, Ohio, Illinois and Mississippi, have adopted the common law rule, with more or less directness and fullness. The cases are very fully collected by the counsel, and we have seen and examined nearly all of them. In the most of those from the northeastern States, the subject is discussed very little; but they simply assume the common law rule as the one to decide by, and look no farther. It is conceived that there is no case in the New England States, which requires comment. In New York, the subject has received a good deal of attention in the cases of *Varick* vs. *Smith*, 5 Paige, 137; *Same* vs. *Same*, Ib. 547; *Ex parte Jennings*, 6 Cowen, 537, in a note to which is published a part of Ld. Hale's

Treat. *De Jure Maris; Canal Com.* vs. *The People*, 5 Wend. 447; *People* vs. *Canal Com.*, 13 Ib. 358; *Canal Appr's* vs. *The People*, 17 Ib. 571; *Hewlett* vs. *Pearsall*, 20 Ib. 111; *Pearsall* vs. *Post*, 22 Ib. 425; *Canal Com.* vs. *Kempshall*, 26 Ib. 404; *Gould* vs. *Hudson R. R. R. Co.*, 2 Seld. 522.

The cases in Pennsylvania, have been cited in the books, on both sides of this question; but it is conceived that there has been a misapprehension of them, in citing them in favor of the old rule. Thus, the American editors of Smith's Leading Cases, in their note to 2d vol. 193, say, that "so far as the tide ebbs and flows, the ownership of the soil to low-water mark, is in the proprietor of the adjoining bank," and cite several Pennsylvania cases, among which are *Hart* vs. *Hill*, 1 Whart. 124; and *Ball* vs. *Slack*, 2 Ib. 508. In that State, the courts have recognized the right of several fisheries, as arising from ancient custom and from statute; but they have held no doctrine of a right to low water, any farther than as relating to and connected with, such fishing. Thus *Hart* vs. *Hill*, was for a direct interruption of the right of a several fishery, and the court say, "and first, a fishery is in the river, and is not the space between high and low water, though the use of that space may be necessary in the use of it, and may be included in the term fishery." It is true that they use general language, which implies more than this, but it is to be taken in reference to the case before them.

In *Ball* vs. *Slack*, 2 Whart. 508, the reporter's abstract says: "It seems that the owners on the Delaware and Schuylkill, have a right to the land between high and low water, subject," &c. It may be doubted whether even this is warranted by the opinion, but admitting that it is, the law there is distinctly settled to the contrary, in *Carson* vs. *Blazer*, 2 Binn. 475, and in *Shunk* vs. *Schuyl. Nav. Co.*, 14 S. & R. 71. Many inaccurate expressions have been used in the cases in that State, relating to fisheries, which have led to confusion, but the subject is much cleared in the two cases above cited. And both Pennsylvania and Connecticut recognize a right, either from statutes or local common law, to build wharves, &c., for commercial purposes. The case of *Chapman* vs. *Kimball*, 9 Conn.

38, announces the rule to be, that owners on navigable rivers own to high-water mark. They say: "The usage of the owners of land to high-water mark, to wharf out against their own land, has never been disputed. This is our common law." Time will not permit the examination of the remainder of the cases cited in the above note, but it is conceived, with deference, that they do not show such a rule to be established—at least outside of their own State.

The case of *Mullanphy* vs. *Daggett*, 4 Mo. 343, is not to be cited in this class, for it stands upon the express ground, that the Spanish government granted to the water. And *Browne* vs. *Kennedy*, 5 Har. & John. 195, is hardly to be ranked here, for the basis of it is the king's grant to the lord-proprietor; which the court considered as carrying the right to the shore, and which the proprietor afterwards granted away. In the above cases, from the most of the foregoing States, the consideration arising from the common law rule, and those connected with it, to which we have before alluded, seem to have carried the minds of the courts, as of course, for there was nothing in their circumstances to awaken the question of the applicability of the old rule. And, besides, the earlier of them set the rule down, before the development of the western country had shown the vast public importance of our greater rivers, as amounting to inland seas. It is also worthy of attention, that these same cases hold, that the rule does not extend to larger bodies of fresh and standing waters, namely, the lakes which are within the limits of New Hampshire. They carry the adjacent owner's right to the water, but not *ad medium*. See *The State* vs. *Gilmanton*, 9 N. H. 463; *Canal Comrs.* vs. *The People*, 5 Wend. 447; and Hale's Treat. in 6 Cow. 545, is cited.

But when we approach those States which, while they border upon the great western rivers, have still been held more or less by the common law rule, we are compelled to give very considerate attention. This has been the case with Ohio. The case of *Blanchard* vs. *Collins et al.*, 11 Ohio, 138, old series, in 1841, if regarded as one of the first settling this question, is certainly not a fully considered one. The common law rule is at once recognized. There

is not a word in relation to the character of that river, the Ohio—nothing in relation to the ordinance of 1787, and its meaning and effect—and nothing concerning the laws and practice in respect to the survey and sale of the public lands. It stands chiefly on the two cases in New York—*The People* vs. *Platt*, 17 Johns. 195, and *Hooker* vs. *Cummings*, 20 Ib. 90—and its own case, *Gavitt* vs. *Chambers*, 14, Ohio, 643. It also relies, partly, upon the cases of *Cooper* vs. *Smith*, 9 S. & R. 26, and *Shunk* vs. *Schuylkill Nav. Co.*, 14 Ib. 74, which it claims to teach, that the riparian proprietor owns to the water, but not *ad medium filum;* and thus neither following the common law, nor wholly abrogating it. We conceive that the court gave these two cases a meaning which they do not inculcate.

* * * * *

In accordance with this general and strong tendency, of the common law, several States have refused to apply the narrow rule to their large waters. As early as 1810, the Supreme Court of Pennsylvania, in the case of *Carson* vs. *Blazer*, 2 Binn. 475; took the lead. The case came up upon exceptions taken to a charge to a jury by Chief Justice Tilghman, concerning a right of fishing. He said: "The several acts of assembly declaring these rivers to be highways, and regulating the fisheries in them, are incompatible with the common law right. But the common law principle concerning rivers, even extended to America, would not apply to such a river as the Susquehanna, which is a mile wide, and runs several hundred miles through a rich country, and which is navigable, and is actually navigated by large boats. If such a river had existed in England, no such law would ever have been applied to it. Their streams, in which the tide does not ebb and flow, are small." It appears from the opinion of Brackenridge, J., that the grants sometimes extended to the water, and called for it, and even where they did so, they were held not to go to the middle of the stream; nor did they go *to* the water, unless the grant was explicit.

This case was followed by *Shunk* vs. *Schuylkill Navigation Co.*, 14 S. & R. 71, in 1826; *Bird* vs. *Smith*, 8 Watts, 434; *Union Canal Co.* vs. *Landis*, 9 Watts, 228, in 1840; all of which recog-

nize the same doctrine. There does not seem to have been advanced in Pennsylvania, a claim to the centre of these large rivers, nor even to the shore. Two of the above cases, arise on claims to the exclusive right to fish with seines in the pools made or kept in order by individuals, founded upon a supposed ancient usage. But the claim of such a right was rejected.

North Carolina, also, in 1828, set aside the common law rule, as inapplicable. And the only thing which gives the riparian owner, in that state, a right down to the water, is the express declaration of their ancient acts of 1715 (or 1765) and 1777, relating to surveys and sales; and their otherwise total exemption from the common law private rights, stands upon the ground that they are declared to be highways, as the acts and laws of the United States have declared other rivers. Tennessee follows the decision in North Carolina, as subject to the same acts of assembly.

In the case of *Cates* vs. *Wadlington*, 1 McCord, 583 (356 top), in 1822, the Supreme Court of South Carolina, by Nott, J., says, "But that rule (the common law) will not do in this State, where our rivers are navigable several hundred miles above the flowing of the tide." And they say this in close connection with the assertion, that there is no legislative act declaring which, or whether any, of their rivers are to be considered as public or navigable, so that the subject was free from any kind of constraint, except the common law rule.

The subject received more elaborate attention in *The Mayor, &c., of Mobile* vs. *Eslava*, 9 Porter, 578, in 1840, than in nearly any of the other cases; and it is here viewed with mere reference to the ordinances and laws of the United States, which are scarcely alluded to in any one of the foregoing cases, but without which, we conceive it impossible to reach the merits of the question. The common law rule alone seems to have absorbed the attention, in the consideration of the cases, whilst the treaties, ordinances and laws of the United States, have been overlooked or passed by in silence.

* * * * *

It is now necessary to see how far the matter has been discussed or settled by the federal courts.

Tyler vs. *Wilkinson*, 4 Mason, 397–400, related to the Pawtucket river, a small river flowing in part of its course between Massachusetts and Rhode Island; but the controversy was between individuals. Judge Story, without any discussion, assumes the application of the common law rule to that part of it which was above the tide water.

Bowman's Devisees and Burnly v. *Wathen et al.*, 2 McLean, 376, is cited on both sides of the question, but we think it a strong authority against the application of the common law rule. Judge McLean says: "We apprehend that the common law doctrine as to the navigableness of streams, can have no application in this country; and that the fact of navigableness does in no respect depend upon the ebb or flow of the tide. On navigable streams, the riparian right, we suppose, cannot generally extend beyond high-water mark." The doubt as to the application of this case, as an authority, arises on the next passage, in which he says: "But in the present case, this inquiry is not important. It is enough to know that the riparian right on the Ohio river extends to the water," and that "the proprietor has the right of fishing, of ferry, and every other right which is properly appurtenant to the soil." The doubt is, whether the learned judge means this latter as a proposition holding true of the Ohio generally, or of grants standing, as the one before him did. He may have intended it of the Ohio generally, upon the strength of the cases before cited from that State; but strong against this construction, is the assertion that the proprietor has the right of fishing! Now, no one has ever gone so far as to claim a several fishery in that, or any other of the great western rivers; and the Ohio cases, as well as *Handly's Lessee* vs. *Anthony*, 5 Wheat. 374, negative such a right; for they hold that as the State of Ohio extends to low-water mark only, of consequence no grant by, or in the State, can extend farther; and the right of a several fishery implies, *ex necessitate*, a title or right *usque filum aquæ*. There is a view which renders Judge McLean's remarks entirely harmonious; that is, considering his last remark as made in reference to the right or title before him. For directly in connection

with the foregoing thought, he proceeds thus: "In coming to this conclusion, we have deemed it unnecessary to look particularly into the laws of Virginia, under which the title in question was derived," &c. "The title of Isaac Bowman (one of the complainants) was derived from the State of Virginia, not only before Indiana was known as a territory, but before the organization of the North-western Territory. His rights, whatever they were, can have been in no respect affected by the direct act of the territorial government, or of the State government which succeeded it."

* * * * *

We desire to add a passage from the opinion of Chief Justice Taney, in the case of the *Propeller Genesee Chief* vs. *Fitzhugh*, 12 How. 443, in 1851, in which case was considered the question of the extension of the admiralty jurisdiction of the United States to navigable waters, other than the tide waters. "Now there is nothing," he says, "in the ebb and flow of the tide, that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide, that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same; and if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it. In England, the writers and courts always speak of the jurisdiction as confined to tide water. And this definition, in England, was a sound and reasonable one, because there was no navigable stream in the country, beyond the ebb and flow of the tide, nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter or depart with cargoes. In England, therefore, tide water and navigable water, are synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. At the time of the adoption of our constitution, the English definition was equally

proper here. In the old thirteen States, the far greater part of the navigable waters are tide waters, &c. * * * * The courts of the United States, therefore, naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction. They measured it by tide water. And that definition, having found its way into our courts, became, after a time, a familiar mode of describing a public river, and was repeated as cases occurred, without particularly examining whether it was as universally applicable in this country as in England. If there were no waters in the United States which are public, as contradistinguished from private, except where there is tide, then unquestionably, here as well as in England, tide water must be the limit of admiralty power. And as the English definition was adopted in our courts, and constantly used in judicial proceedings, and forms of pleading, borrowed from England, the public character of the river was in process of time lost sight of, and the jurisdiction of the admiralty treated as if it were limited by the tide. The description of a public navigable river, was substituted in place of the thing intended to be described. And under the natural influence of precedents and established forms, a definition, originally correct, was adhered to and acted on, after it had ceased, from a change of circumstances, to be the true description of public waters."

Judgment reversed.

In the Supreme Court of Ohio, December Term, 1856.

REUBEN H. THURSTON AND THOMAS HAYS *vs.* WILLIAM LUDWIG.

A verbal agreement, to be effectual as a *waiver*, *variation*, or *change* in the stipulations of a prior written contract between the parties, must rest upon some new and distinct legal consideration, or must have been so far executed or acted upon by the parties, that a refusal to carry it out would operate as a fraud upon one of the parties.

Petition in error, to reverse the judgment of the District Court of Crawford county.

The original action was assumpsit, brought by the plaintiffs in